

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JOSE MENDEZ-MORALES,)	
)	
Petitioner,)	8:05cv191
)	
vs.)	MEMORANDUM AND ORDER
)	
WARDEN SAMUELS, JR.,)	
)	
Respondent.)	

This matter is before the court on the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 (“§ 2241 petition”), filed by the petitioner, Jose Mendez-Morales, and on the petitioner’s Application for Leave to Proceed In Forma Pauperis. In his § 2241 petition, the petitioner challenges his conviction in *United States of America v. Jose Mendez-Morales*, Case No. 4:02cr3103 (D. Neb.). The petitioner is presently serving a sentence at a federal prison facility in Kentucky.

However, the petitioner may not use 28 U.S.C. § 2241 to assert his claims in this court. A motion pursuant to 28 U.S.C. § 2255, brought before the sentencing court, is the appropriate vehicle for a convicted federal prisoner to challenge his conviction as in violation of the Constitution or laws of the United States and to move to vacate his sentence. On the other hand, a petition pursuant to 28 U.S.C. § 2241, filed in a court within the district of confinement, challenges the execution of a federal prisoner's sentence.¹ Thus, federal prisoners challenging the legality or validity of their convictions

¹For purposes of 28 U.S.C. § 2241, execution of a sentence “includes such matters as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention and prison conditions.” *Jiminian v. Nash*, 245 F.3d 144, 146 (2d Cir. 2001).

or sentences must do so by a motion pursuant to § 2255 rather than by a petition pursuant to § 2241. See, e.g., United States v. Lurie, 207 F.3d 1075, 1077 (8th Cir. 2000); Carvalho v. Pugh, 177 F.3d 1177, 1178-79 (10th Cir. 1999); Triestman v. United States, 124 F.3d 361, 373 (2d Cir. 1997). In the rare exception, discussed below, when a convicted federal prisoner may use § 2241, the petition must be filed in federal court in the district in which the prisoner is incarcerated.

Although a narrow exception permits limited use of § 2241 to challenge the validity of a conviction, the § 2241 petition in this case does not fit within that exception to the general bar against using § 2241, instead of § 2255, for collateral attack by a federal prisoner on a conviction or sentence. “A writ of habeas corpus on behalf of a petitioner may issue under 28 U.S.C. § 2241 **only if** it ‘appears that the remedy by motion [under § 2255] is inadequate or ineffective to test the legality of his detention.’” United States v. Lurie, 207 F.3d at 1077 (emphasis added). However, a § 2255 remedy is not considered inadequate or ineffective if, for example, a § 2255 motion has previously been denied, the statute of limitations has expired on a § 2255 claim, or there are procedural barriers to pursuing relief under § 2255. Id. at 1077-78. Accord Wesson v. U.S. Penitentiary, 305 F.3d 343, 347 (5th Cir. 2002).

THEREFORE, IT IS ORDERED:

1. That filing no. 2, the petitioner’s Application for Leave to Proceed In Forma Pauperis, is granted;
2. That the Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2241 filed by the petitioner, Jose Mendez-Morales, and this action are dismissed without prejudice; and

3. That a separate judgment will be entered in accordance with this Memorandum and Order.

DATED this 5th day of May, 2005.

BY THE COURT:

s/ Joseph F. Bataillon
JOSEPH F. BATAILLON
Chief District Judge